IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ROBERT R. GAGNÉ **PLAINTIFF**

VERSUS **CASE NO.: 1:06-CV-711-LTS-RHW**

STATE FARM FIRE AND CASUALTY COMPANY, et al. **DEFENDANTS**

STATE FARM FIRE AND CASUALTY'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER RULINGS IN PRIOR CASES [DOCS. 448, 464]

State Farm Fire and Casualty Company ("State Farm") respectfully submits this response in opposition to Plaintiff's motion for the Court to reconsider its many Hurricane Katrina rulings regarding the effect of receiving and retaining flood insurance payments. [Docs. 448, 464.][1] This Court, Judge Ozerden, and other judges in Hurricane Katrina cases have repeatedly held that receiving and retaining flood insurance payments establishes that the property sustained flood damage at least corresponding to the amount of the payments. As discussed below, this Court's opinions on this issue are correct and accord with the opinions of Judge Ozerden and the overwhelming majority of other judges who have addressed the issue.

It is undisputed that at the time of Hurricane Katrina, Plaintiff held a Standard Flood Insurance Policy ("SFIP") issued by State Farm as a Write-Your-Own ("WYO") carrier under the National Flood Insurance Program ("NFIP"). The policy covered flood damage to Plaintiff's dwelling and personal property and excluded wind damage. *See* 44 C.F.R. pt. 61, app. A(1), art. I, V(D)(8). Following Hurricane Katrina, State Farm adjusted Plaintiff's damages and paid Plaintiff the policy limits of $250,000 for flood damage to his dwelling and $100,000 for flood damage to his personal property. Plaintiff admitted in this case that the SFIP payment of $250,000 was "for damage to the dwelling caused by flood." Pl. Resp. to Req. for Admis'n (attached as Exhibit A) at No. 3. Plaintiff has received

[1] This Court ordered that Plaintiff file his motion by December 4, 2008. [Text Order of November 12, 2008.] Plaintiff did not file the instant motion by December 4 but filed only a memorandum of law, unaccompanied by any motion. [Docs. 448-49.] Plaintiff did not file the instant motion until December 5, 2008. [Doc. 464.] Accordingly, Plaintiff's motion is untimely and should be struck.

and retained the total of $350,000 he was paid for flood damage under his SFIP.

Now, by the instant motion, Plaintiff attempts to take the irreconcilable position that "his home was a total loss as a result of covered perils prior to the arrival of the storm surge," and "State Farm is primarily liable for the *entire* loss under the homeowner's policy." [Doc. 449 at 3, 6 (emphasis added).] Plaintiff is not, however, offering to return the $350,000. Plaintiff proposes to retain $350,000 that he now repudiates and seeks the full limits under his homeowners policy, which would result in an impermissible double indemnity.

To prevent that absurd result, it is well-established in this Court and others that an insured's acceptance and retention of flood insurance payments is a judicial admission that the property sustained flood damage in the amount of the flood insurance payments. The insured is, therefore, equitably estopped from contending otherwise. Plaintiff sought, received, and retained $350,000 under his SFIP knowing that it covered for flood damage to his property, not wind. Under this Court's well-reasoned precedent, Plaintiff cannot now be heard to contend otherwise. Accordingly, this Court should deny Plaintiff's motion in its entirety.

I. UNDER THE GREAT WEIGHT OF AUTHORITY AND THE INDEMNITY PRINCIPLE, PLAINTIFF'S RECEIPT AND RETENTION OF FLOOD INSURANCE PAYMENTS ESTABLISHES THAT FLOOD DAMAGE OCCURRED IN AN AMOUNT AT LEAST EQUAL TO THE FLOOD PAYMENTS ISSUED

As Your Honor has held, it is well-established that "the plaintiffs' receipt of flood insurance benefits constitutes a judicial admission that flood damage occurred and precludes the plaintiffs' denying that at least the amount of damage represented by the flood insurance payment was caused by flooding." *McIntosh v. State Farm Fire & Cas. Co.*, 2008 WL 1776409, *2 (S.D. Miss. Apr. 14, 2008) (Senter, J.) The law provides that a judicial admission is "'conclusive'" and "binding on the party making [it]." *Martinez v. Bally's La., Inc.*, 244 F.3d 474, 476-77 (5th Cir. 2001) (citation omitted). It "has the effect of withdrawing a fact from contention" and may not be "controverted or explained by the party who made it." *Id.*

Numerous decisions by this Court reinforce this fundamental principle in Hurricane Katrina litigation, which stems from the common sense notion that "the claimant may recover under all available coverages *provided that there is no double recovery*." 15A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 56:34 (2d ed. 1983) (emphasis added). "The indemnity principle limits the property owner's total recovery to the amount of his loss, i.e. the property owner can collect no more, from all of his available insurance coverages, than the amount necessary to fully compensate him for the damage to his insured property." *Espinosa v. Nationwide Mut. Fire Ins. Co.*, No. 1:06CV896-LTS-RHW, 2008 WL 276534, at *1 (S.D. Miss. Jan. 30, 2008) (Senter, J.); *accord* 12 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 175:5 (3d ed. 2006) ("[B]oth the extent and the limitation of recovery is found in the concept of making good the loss which the insured has sustained.").

This Court has correctly applied the indemnity principle to Hurricane Katrina litigation. *See Robichaux v. Nationwide Mut. Ins. Co.*, No. 1:06CV1165-LTS-RHW, 2007 WL 2783325, at *2 (S.D. Miss. Sept. 21, 2007) (Senter, J.) ("Once an insurance payment is made and accepted, this act establishes, as an admission by both the insurer and the insured, that the insured's losses were caused by an event covered by the policy under which the payment is made, at least to the extent of the amount paid and accepted."); *SIMA/Signature Lake, L.P. v. Certain Underwriters at Lloyds London*, No. 1:06CV186-LTS-RHW, 2006 WL 3538862, at *3 (S.D. Miss. Dec. 7, 2006) ("Where one insurer, in this instance the flood insurer, has settled an insured's claim by paying policy limits, the insured may be estopped from recharacterizing, as wind damage, losses for which he has accepted flood insurance compensation."); *Gemmill v. State Farm Fire & Cas. Co.*, No. 1:05CV692-LTS-RHW, slip op. at 2 (S.D. Miss. Mar. 15, 2007) (plaintiff's acceptance of $128,100 under his flood policy was "an admission by the plaintiff that at least this amount of damage was done by storm surge flooding").[2]

[2] *See also Schmermung v. Nationwide Mut. Ins. Co.*, No. 1:07CV1213-LTS-RHW, 2008 WL 5169369, at *2 (S.D. Miss. Dec. 5, 2008) (Senter, J.) (because of the plaintiff's application and receipt of flood payments, "Plaintiff will not be allowed to deny that the insured property experienced damage to some extent from the effects of storm surge flooding, and conversely *(cont'd)*

Judge Ozerden is also in accord with this Court's well-settled precedent on the matter. Judge Ozerden held in a recent Hurricane Katrina case that "Plaintiffs' receipt of flood insurance benefits constitutes an admission that flood damage occurred," at a minimum, "'to the extent of the amount paid and accepted.'" *Fowler v. State Farm Fire & Cas. Co.*, No. 1:06CV489-HSO-RHW, 2008 WL 305417, *8 (S.D. Miss. July 25, 2008) (Ozerden, J.) (quoting *Robichaux*, 2007 WL 2783325, at *3).

Federal courts in the Eastern District of Louisiana have also joined the great weight of authority on this issue. For example, in *Esposito v. Allstate Insurance Co.*, No. 06-1837, 2007 WL 1125761 (E.D. La. Apr. 16, 2007), the court held that the insurance company defendant was entitled to an offset for what the plaintiff had received under his flood policy. *See id.* at *1-2. The plaintiff in that case had

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may not assert that the destruction of his home was solely caused by the peril of windstorm"); *Sanders v. Nationwide Mut. Fire Ins. Co.*, No. 1:07CV98-LTS-RHW, 2008 WL 5120679, at *1 (S.D Miss. Dec. 3, 2008) (Senter, J.) ("The limits of the plaintiffs' SFIP coverage have been paid, and I have ruled in this and other cases that acceptance of flood insurance benefits is an admission by the recipient that the insured property was damaged by storm surge flooding to the extent of the SFIP benefits accepted."); *Holmes v. Meritplan Ins. Co.*, No. 1:07CV680-LTS-RHW, 2008 WL 4615439, at *1 (S.D. Miss. Oct. 16, 2008) (Senter, J.) ("Plaintiffs are estopped from denying that their insured property experienced damage to some extent from the effects of storm surge flooding at least in the amount of flood benefits that have been paid. This estoppel is based on the Plaintiffs' receipt of flood insurance benefits which constitutes an admission that some of the damage to their home was caused by flooding."); *Dickinson v. Nationwide Mut. Fire Ins. Co.* , No. 06cv198-LTS-RHW, 2008 WL 2568140, at *1 (S.D. Miss. June 24, 2008) (Senter, J.) ("Nationwide asserts that the application for this flood damage grant and the receipt of the grant itself is an admission by the plaintiffs that their dwelling sustained flood damage and that the destruction of the property was not *solely* caused by the peril of windstorm. To this extent, Nationwide's point is well taken. I agree with Nationwide's contention that the plaintiffs' grant application and the receipt of the grant itself constitutes an admission that some of the damage to the plaintiffs' home was caused by flooding."); *Espinosa v. Nationwide Mut. Fire Ins. Co.*, No. 1:06CV896-LTS-RHW, 2008 WL 276534, at *1 (S.D. Miss. Jan. 30, 2008) (Senter, J.) ("Plaintiffs Mario and Rose Espinosa, having accepted flood insurance benefits of $250,000, have admitted that at least $250,000 of the damage done to their insured property was attributable to flood damage. The plaintiffs' total losses have thus been reduced by $250,000. In order to establish their right to recover the limits of liability under their Nationwide homeowners policy, the plaintiffs must prove, by a preponderance of the evidence, that they have sustained losses covered by the Nationwide homeowners policy in excess of this $250,000 that are equal to or greater than their Nationwide homeowners policy limits."); *Huynh v. State Farm Fire & Cas. Co.*, No. 1:06CV1061-LTS-RHW, 2008 WL 80759, at *1 (S.D. Miss. Jan. 7, 2008) (Senter, J.) ("[A]ll parties should be mindful of the Court's position that receipt of payment under a flood insurance policy usually establishes that at least that amount of flood damage occurred, and that this amount is factored into any ultimate recovery."); *Mills v. State Farm Fire & Cas. Co.*, No. 1:07CV73-LTS-RHW, 2007 WL 1514021, at *5 (Senter, J.) (S.D. Miss. May 21, 2007) ("By offering and accepting the flood insurance policy limits, the parties have indicated their agreement that at least to the extent of these benefits the damage to the insured property was caused by flooding, and the parties are now judicially estopped from denying this."); *Aiken v. Rimkus Consulting Group, Inc.*, No. 1:06CV741-LTS-RHW, 2007 WL 4245906, at *1 (S.D. Miss. Nov. 29, 2007) (Senter, J.) (same); *Letoha v. Natinowide Ins. Co.*, No. 1:06CV1009-LTS-RHW, 2007 WL 2059991, *2 (S.D. Miss. July 12, 2007) (Senter, J.) ("By accepting benefits tendered under a flood insurance policy, an insured makes a judicial admission that the insured property sustained flood damage at least equal to the flood insurance benefits he accepts. The insured is thereafter estopped to deny that this flood damage has occurred. The maximum the insured may thereafter recover is the difference between the pre-storm value of the insured property and the flood insurance benefits he has accepted.").

received $185,265 under his flood policy but then sued under his homeowners policy, "contend[ing] that wind caused a total loss of the property and . . . seek[ing] the full policy limits on his homeowner's policy." *Id.* at *1. The court in *Esposito* held that a double recovery would be impermissible:

> [The plaintiff] is entitled to recover in this lawsuit any *previously uncompensated losses* that are covered by his homeowner's policy *and which when combined with his flood proceeds do not exceed the value of his property*. [The plaintiff] is not entitled to obtain a windfall double recovery by now recharacterizing as wind damage those looses for which he has already been compensated by previously attributing them to flood waters.

Id. at *2 (emphasis in original); *accord Mui v. State Farm Fire & Cas. Co.*, No. 06-8238, 2007 WL 5433485, at *2 (E.D. La. July 26, 2007) (Zainey, J.) ("By accepting the flood proceeds Plaintiffs tacitly confirmed that the damages identified were caused by flood. Consistent with the rulings in cases like *Weiss*, *Esposito*, and *Ware*, Plaintiffs cannot obtain a double recovery by reclassifying damages previously attributable to flood, and paid for under a flood policy, as now being attributable to wind.") Likewise, in *Ferguson*, Judge Berrigan in the Eastern District of Louisiana applied an offset for flood insurance payments even though the plaintiffs "never stated nor signed a proof of loss alleging their home was destroyed solely as a result of flooding." *Ferguson v. State Farm Ins. Co.*, No. 06-3936, 2007 WL 1378507, at *4 (E.D. La. May 9, 2007) (Berrigan, J.).[3]

Judge Vance of the Eastern District of Louisiana recently rejected a contention similar to Plaintiff's here, namely, that a plaintiff should be permitted to claim that wind caused all of his losses when the plaintiff has received and retained full flood insurance proceeds. In *Gaffney v. State Farm Fire and Casualty Co.*, No. 06-8143, 2008 WL 941717 (E.D. La. Apr. 7, 2008), Judge Vance rejected

[3] *See also Ragas v. State Farm Fire & Cas. Co.*, No. 07-1143, 2008 WL 425536, at *6 (E.D. La. Feb. 11, 2008) (Engelhardt, J.) (holding that plaintiff was not entitled to "obtain a windfall double recovery"); *Weiss v. Allstate Ins. Co.*, No. 06-3774, 2007 WL 891869, at *3 (E.D. La. Mar. 21, 2007) (Vance, J.) (recognizing "the well-established propositions that insurance contracts are contracts of indemnity and that an insured cannot recover an amount greater than her loss"); *Wellmeyer v. Allstate Ins. Co.*, No. 06-1585, 2007 WL 1235042, at *2 (E.D. La. Apr. 26, 2007) (Feldman, J.) (recognizing that plaintiffs "may not enjoy a double recovery for the same lost property" under their flood and homeowners policies); *Louque v. State Farm Fire & Cas. Co.*, No. 06-2881, 2007 WL 1343636, at *2 (E.D. La. May 4, 2007) (McNamara, J.) (observing that "an insured cannot recover twice for a single loss"); *Boudoin v. State Farm Ins. Cos.*, Civil Action No. 06-01656, 2007 WL 2066853, at *4 (W.D. La. July 13, 2007) (Melancon, J.) (holding that plaintiffs were not entitled to a double recovery); *see generally Wellmeyer*, 2007 WL 1235042, at *2-3 & n.2 (citing cases).

the inherently irreconcilable positions of seeking recovery for a total loss under both a flood and homeowners policy: "[P]laintiffs cannot have it both ways, i.e., treating the loss as caused totally by wind when they litigate the homeowner's policy, but accepting their flood limits as though the loss were caused by flood under the policy." *Id.* at *4. The court further explained:

> This is not a situation in which plaintiffs claim that flooding caused separable losses up to their flood limits, wind caused losses up to their homeowner's limits, and the property was worth at least the sum of the two types of losses. Plaintiffs claim that wind caused all of their losses, not flooding. If that is the case, were plaintiffs allowed to recover up to the limits of both policies, they would be compensated twice for the same loss. For this reason, the most plaintiffs can recover if they prove their case is the limits of the homeowner's policy less the amounts they have already received. Plaintiffs' dwelling limits under their homeowner's policy were $132,000, or 110 percent of $132,000, if plaintiffs fully replaced their property. Plaintiffs have already received $132,000 under their flood policy and $39,922.73 for the dwelling under their homeowner's policy. That amount exceeds 110 percent of $132,000, which is the maximum they could recover for their dwelling under their homeowner's policy. Accordingly, they are not due any additional payment for dwelling damage under their homeowner's policy.

Id. at *3.

Plaintiff's fleeting assurances in his motion that he is not seeking a double recovery withstand no scrutiny. Having received and retained $350,000 in flood insurance payments from State Farm, Plaintiff now seeks the policy limits under his homeowners policy for the same loss, and Plaintiff asks "the court to direct State Farm to reimburse the NFIP program for the funds they improperly paid him." [Doc. 449 at 17-18.] Under Plaintiff's theory, Plaintiff would recover the full limits under both policies for the same loss. Plaintiff's brazen proposition must be rejected out of hand. Not even Plaintiff's purported expert (who State Farm has moved to exclude and thus does not waive and specifically reserves all arguments made in support of that motion) on insurance practices adopts a position so far afield. *See* Dismore Dep. (attached as Exhibit B) at 51:21-53:4.[4] "[T]here is no logic in saying that Plaintiff's

[4] "Q. Okay. Based on your testimony from your conclusion that we've been through here where it says that there was a covered loss in part as well as the fact that Mr. Gagne has accepted and received $350,000, 250 for the house and 100,000 for the contents, there is no question that there was at least $250,000 of flood damage done to that house?

A. I would not contest that.

. . .

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receipt of flood insurance payment is meaningless." *Gunn v. Lexington Ins. Co.*, No. 1:07CV478-LTS-RHW, 2008 WL 2039543, at *3 (S.D. Miss. May 12, 2008) (Senter, J.). Mississippi law does not allow double recovery under multiple insurance policies for the same damage. *See, e.g., Spencer v. State Farm Mut. Ins. Co.*, 891 So. 2d 827, 830 (Miss. 2005) (disallowing further recovery under uninsured motorist coverage that "would result in double recovery").

Indeed, Plaintiff relies on a case from the Eastern District of Louisiana that reinforces this Court's well-established precedent. [Doc. 449 at 6 (citing *Metoyer v. Auto Club Family Ins. Co.*, 536 F. Supp. 2d 664 (E.D. La. 2008).] In that case, the court granted the plaintiff's motion *in limine* to exclude reference to public assistance they received from Louisiana. *Metoyer*, 536 F. Supp. 2d at 665 (noting that "no Louisiana state or federal court has addressed the issue of whether [Louisiana Recovery Authority] benefits should be excluded" from trial). But the court distinguished that determination from federal flood insurance payments. *Id.* at 671. With regard to flood insurance payments, the court held that "[c]ourts in this state have routinely held that a plaintiff is not permitted double recovery from insurance for the same loss, and Louisiana courts are in accord." *Id.* The court did not grant the plaintiff's motion *in limine* because it was not clear "what the Plaintiff is claiming in damages, and the extent of coverage for the flood insurance." *Id.* Yet, in this case, those facts *are* clear: Plaintiff is seeking full payments under his homeowners policy, and he already received and still retains $350,000 in flood insurance payments.

Accordingly, the great weight of authority from this Court and others courts in Hurricane Katrina cases correctly hold that Plaintiff's receipt and retention of flood insurance payments is a judicial

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> Q. Okay. And it would not be consistent with your opinion to maintain in this case that the house was, and its contents were completely, fully and completely destroyed by wind?
>
> A. As a claims adjuster, I would agree with you."

Ex. B at 51:21-52:20 (objections omitted). State Farm has pending a *Daubert* motion to strike the proposed opinion and testimony of Dinsmore, and State Farm preserves and does not waive its arguments and authorities therein.

admission that his property sustained flood damage and reduces Plaintiff's homeowners recovery accordingly.

II. PLAINTIFF'S ADMISSION ESTOPS HIM FROM PLAYING "FAST AND LOOSE" WITH THIS COURT BY ATTEMPTING TO REPUDIATE HIS RECEIPT AND RETENTION OF FLOOD INSURANCE PROCEEDS

Having received $350,000 under his flood policy, Plaintiff now claims that *all* of his losses were caused by wind, and Plaintiff seeks to recover under his homeowners insurance policies for the same loss he was paid under the flood policy. Plaintiff's vacillating positions are clearly inconsistent, and the law does not permit him to gain the economic windfall of these irreconcilable factual contentions.

A. Judicial and Equitable Estoppel Protects Against Plaintiff's Double Indemnity

Judicial estoppel is an equitable doctrine that "'protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *Khan v. Hakim*, 201 F. App'x 981, 984 (5th Cir. 2006) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)). As an exercise of equitable power, the use of judicial estoppel is reviewed under an abuse of discretion standard. *See, e.g., In re Superior Crewboats, Inc*., 374 F.3d 330, 334 (5th Cir. 2004). It is intended to prevent the perversion of the judicial process and a party from "'playing fast and loose' with the courts." *Id.* (citation omitted). It has long been the law that "'where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *Zedner v. United States*, 126 S. Ct. 1976, 1987 (2006) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).[5]

Similarly, the doctrine of judicial estoppel prevents litigants "'from playing fast and loose with the courts to suit the exigencies of self interest,'" *In re Superior Crewboats, Inc*., 374 F.3d at 334

[5] Indeed, when Plaintiff was asked by interrogatory to "detail the legal and factual basis" for seeking a full recovery under his homeowners policy, Plaintiff omitted any reference to his SFIP payments. Pl. Resp. to Interrogs. (attached as Exhibit A) at No. 15.

(citation omitted), by asserting "'a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding,'" *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (citation omitted). The "earlier proceeding" need not have been a formal judicial proceeding, and courts have applied the doctrine to preclude a plaintiff from pursuing a legal claim that is fundamentally inconsistent with representations made in an earlier application for benefits. In *McClaren v. Morrison Management Specialists, Inc.*, 420 F.3d 457 (5th Cir. 2005), the Fifth Circuit held that a plaintiff was judicially estopped from asserting a claim for age discrimination (which requires an allegation the plaintiff would have been able to perform the job for which he was not selected) based on the plaintiff's statements in an earlier claim for Social Security disability benefits that he was "unable to work" because of illness. *See id.* at 466; *see also Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999); *Reed v. Petroleum Helicopters, Inc.*, 218 F.3d 477, 480-81 (5th Cir. 2000). As stated by one court, "[w]e cannot permit litigants to adopt an alternate story each time it advantages them to change the facts." *Feldman v. Am. Mem'l Life Ins. Co.*, 196 F.3d 783, 791 (7th Cir. 1999). That is precisely what Plaintiff seeks to do in this case.

Equitable estoppel reaches the same result. "It is recognized that under the doctrine of equitable estoppel a party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation, or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects." *Kaneb Servs., Inc. v. Fed. Sav. & Loan Ins. Corp.*, 650 F.2d 78, 81 (5th Cir. 1981) (citing cases). Under either doctrine of estoppel, Plaintiff's acceptance and retention of flood insurance payments bars him from advancing any contrary position, including that his property was entirely destroyed by wind.

Plaintiff's reliance on *Hopkins v. Cornerstone American* is misplaced because that case does not alter Fifth Circuit law on judicial estoppel. 545 F.3d 338 (5th Cir. 2008). In *Hopkins*, the court simply held that the district court incorrectly applied the equitable doctrine of judicial estoppel under the

specific facts of that case. *Id.* at 346-48. The court reinforced that "we review the use of judicial estoppel only for abuse of discretion" but held that the district court applied judicial estoppel based on erroneous legal conclusions peculiar to Texas employment law. *Id.* at 346-47. The district court found that the plaintiff previously defended a sexual harassment suit by pleading that he was an independent contractor but then asserted that he was an employee. *Id.* at 347. The district court thus held in *Hopkins* that the plaintiff could not claim to be an employee to advance his cause of action, and the court entered summary judgment. *Id.* at 341, 346-47. On appeal, the Fifth Circuit held that under Texas law, the plaintiff could claim that he was an independent contractor for one purpose and an employee for another without contradiction. *Id.* at 347. Under that straight-forward determination of Texas law, the plaintiff was not being inconsistent, *id.*, unlike Plaintiff's inconsistent position in this case. *See supra* at 1-2.

B. Plaintiff Knowingly Sought, Received, and Retained SFIP Payments Under the NFIP for Flood Damage to His Property

Plaintiff seeks to prove that wind caused *all* of his losses [Doc. 449 at 3-4, 6], an allegation that flatly contradicts his earlier receipt and retention of $350,000 in flood insurance payments. "[A] party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation, or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects." *Kaneb Servs., Inc.*, 650 F.2d at 81. In this case, Plaintiff has unequivocally admitted that he received $250,000 "for damage to the dwelling *caused by flood*." Ex. A (emphasis added). In addition to Plaintiff's actual knowledge, as discussed below, Plaintiff is charged with knowledge as a matter of law that the entire $350,000 paid under his flood policy covered flood damage to his house and personal property, not wind.

As a matter of law, Plaintiff had "a duty to read and understand" his SFIP and "a duty to familiarize [himself] with the terms of the policy." *Richmond Printing LLC v. Dir. FEMA*, 2003 WL 21697457, at *6 (5th Cir. 2003). "[I]n the context of an insurance policy, knowledge of contract terms is 'imputed to [the contracting party] as a matter of law.'" *Ross v. Citifinancial Inc.*, 344 F.3d 458, 465 (5th

Cir. 2003) (applying Mississippi law; citation omitted; alteration in original). Knowledge of the policy terms is imputed to Plaintiff as a matter of law "[w]hether the policy was read or not." *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 438 (5th Cir. 2007).

Moreover, Plaintiff is charged with knowledge of the SFIP because the NFIP "is a federally-administered program supported by funds drawn from the federal treasury," and "the person seeking those funds is obligated to familiarize himself with the legal requirements for receipt of such funds." *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 388 (5th Cir. 2005) (citing *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 (1984)); *accord Richmond Printing LLC*, 72 F. App'x at 97-98; *see Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F. Supp. 2d 606, 616-17 (S.D. Miss. 2001). Plaintiff is also charged with knowledge of the SFIP as a matter of law, due in part to "the special nature" and "[t]he unique situation presented by the NFIP," which "creates additional responsibilities for the insured." *Richmond Printing LLC*, 72 F. App'x at 98. "Unlike a typical automobile or health insurance policy," the SFIP is published in the Code of Federal Regulations, which affords Plaintiff "an additional outlet . . . to obtain information." *Id.* at 98. As a matter of law, that outlet "is sufficient to give notice of the contents of the document to a person subject to or affected by it." 44 U.S.C. § 1507.

Accordingly, in making a flood insurance claim, accepting payment, and retaining those proceeds, Plaintiff knowingly acknowledged that the damage to his property, or at least that portion of the damage indemnified by the flood insurance payments, was a "direct physical loss by or from flood," 44 C.F.R. pt. 61, App. A(1), art. I, and was not directly or indirectly caused by "wind, or windstorm," *id.* at pt. 5(D)(8) art. V(D)(8). In fact, Plaintiff openly admits that his $250,000 SFIP payment was for flood damage to his dwelling. Ex. A. In light of Plaintiff's actual and constructive knowledge of the nature of his SFIP payments, it would be unreasonable for Plaintiff to contend otherwise. The essentially factual predicate underlying Plaintiff's claims for, acceptance, and retention of flood insurance proceeds – under a policy that covers "direct physical loss by or from flood" and specifically

excludes loss caused "directly or indirectly" by wind – is totally irreconcilable with his current claims that the same damage was caused by wind and not by flood. There was no mistake. Plaintiff is trying to have it both ways.

> "The NFIP program did not *erroneously* make payments to Plaintiff for flood losses to his home. Plaintiff sought those payments and he obtained them by convincing FEMA that his losses were caused by flood and covered by his flood policy. Plaintiff has now been compensated for those losses based on the statements and information that he provided to FEMA. For purposes of the instant suit this Court will not allow Plaintiff to cavalierly repudiate those prior statements while nevertheless retaining the funds that he received based on those same statements."

Esposito v. Allstate Insurance Co., No. 06-1837, 2007 WL 1125761, at *2 (E.D. La. Apr. 16, 2007); s*ee also SIMA/Signature Lake, L.P.*, 2006 WL 3538862, at *3 (noting that "[w]here one insurer, in this instance the flood insurer, has settled an insured's claim by paying policy limits, the insured may be estopped from recharacterizing, as wind damage, losses for which he has accepted flood insurance compensation"); *Glover v. Nationwide Mut. Fire Ins. Co.*, Civ. A. No. 1:06CV85-LTS-RHW, 2006 WL 3780858, at *1 (S.D. Miss. Dec. 21, 2006) (same).[6]

C. Plaintiff's Tortured Reading of the SFIP Subrogation Clause Avails Nothing

Plaintiff asserts that estoppel is unnecessary because his "receipt of that amount [is] subject to the subrogation clause of the [SFIP,] which states that FEMA is subrogated to an insured's right to recover for a loss." [Doc. 449 at 4.] Not surprisingly, Plaintiff does not cite a single case or authority applying this novel argument to the NFIP.[7] In fact, one case Plaintiff cites directly distinguishes between the effect of admitting evidence of SFIP payments and payments from other public sources because, with regard to SFIP payments, "[c]ourts in this state have routinely held that a plaintiff is not

[6] Plaintiff alleges that *all* of his losses were due to wind and covered by the homeowners policy, but by retaining the flood insurance payments when he filed suit against State Farm, Plaintiff effectively elected his remedy. Plaintiff cannot maintain an action for "all wind" under his homeowners policy while retaining $350,000 for flood damage under his SFIP.

[7] Plaintiff's citations do not discuss the NFIP. [Doc. 449 at 5-6]; *see Waters v. Farmers Tex. Cty. Mut. Ins. Co.*, 9 F.3d 397 (5th Cir. 1993) (Medicare); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442 (5th Cir. 1991) (private insurance); *Foremost Cty. Mut. Ins. Co. v. Home Indemn. Co.*, 897 F.2d 754 (5th Cir. 1990) (same); *XL Ins. Am., Inc. v. TIG Speciality Ins. Co.*, 2008 U.S. Dist. LEXIS 62128 (N.D. Tex. Aug. 13, 2008) (same); *Metoyer*, 536 F. Supp. 2d at 665 (Louisiana Redevelopment Authority; permitting evidence of SFIP payments).

permitted double recovery from insurance for the same loss, and Louisiana courts are in accord." *Metoyer*, 536 F. Supp. 2d at 671.

Plaintiff labors under a tortured reading of the subrogation provision in the SFIP and, tellingly, fails to quote that provision for the Court. The plain language of the subrogation provision reveals that it is entirely inapposite:

> Whenever we make a payment for a loss under this policy, we are subrogated to your right to recover for that loss from any other person. *That means* your right to recover for a loss that was partly or totally caused by someone else is automatically transferred to us to the extent that we paid you for the loss . . . if you make any claim against any person who caused your loss and recover any money, you must pay us back first before you may keep any money.

44 C.F.R. pt. 61, app. A(1), art. VII(S) (emphasis added).

In this case, Plaintiff has not claimed and cannot claim that State Farm caused his loss. Rather, the crux of the dispute is whether Plaintiff's loss was caused by wind or flooding associated with Hurricane Katrina. The above subrogation provision is clearly directed at the recovery of claims against negligent third parties for covered flood damage. Federal regulations confirm that the subrogation provision is intended to provide the NFIP with a right to seek compensation from a tortfeasor – not to alter the contractual relationship between an insured and a WYO insurer. In fact, rather than creating a right by the NFIP to recover for overpayment as Plaintiff contends, the right of subrogation resides with the WYO insurer, *i.e.*, State Farm, as evidenced in 44 C.F.R. § 62.23(i)(8):

> Regarding the handling of subrogation, if a WYO Company prefers to forego pursuit of subrogation recovery, it may do so by referring the matter, with a complete copy of the claim file, to FIA [Federal Insurance Administration].

44 C.F.R. § 62.23(i)(8). Thus, to the extent subrogation applies here at all – and it does not – State Farm is already a party to this case. In short, the text of the subrogation clause, the regulations supporting the NFIP, and common sense compel rejection of the subrogation theory asserted by Plaintiff.

III. CONCLUSION

This Court should continue to apply its well-reasoned precedent regarding an insured's receipt

and retention of SFIP payments. Plaintiff has advanced no argument or authority justifying a departure from the precedent in this Court and other courts in Hurricane Katrina cases. For all the foregoing reasons, this Court should deny Plaintiff's motion in its entirety.

RESPECTFULLY SUBMITTED, this 29th day of December, 2008.

WEBB, SANDERS & WILLIAMS, P.L.L.C.
363 NORTH BROADWAY
POST OFFICE BOX 496
TUPELO, MISSISSIPPI 38802
(662) 844-2137
DAN W. WEBB, MSB #7051
B. WAYNE WILLIAMS, MSB # 9769
J. DOUGLAS FOSTER, MSB #100641

By: /s/ Dan W. Webb
DAN W. WEBB

CERTIFICATE OF SERVICE

I, Dan W. Webb one of the attorneys for the Defendant, State Farm Fire and Casualty Company, do hereby certify that I have this date electronically filed the foregoing, with the Clerk of the Court using the ECF system which sent notification of such filing to the following ECF participants:

Attorneys for Plaintiff:

Jesse B. Hearin, III, Esq.
Hearin, LLC
1009 Carnation St., Suite E
Slidell, LA 70460
Email: jbhearin@gmail.com

William F. Merlin, Jr.
Merlin Law Group
777 S. Harbour Island Blvd., Ste 950
Tampa, FL 33602
Email: wmerlin@merlinlawgroup.com

Attorneys for Defendants:

Philip W. Thomas, Esq.
Philip W. Thomas, P.A.
Post Office Box 24464
Jackson, MS 39225-4464
Email: pthomas@thomasattorney.com

James J. Ficenec
Seller, Hazard, McNeeley & Manning
1111 Civic Drive, Ste 300
Walnut Creek, CA 94596-3894
Email: Jficenec@sellarlaw.com

THIS, the 29th day of December, 2008.

BY: /s/ Dan W. Webb
DAN W. WEBB